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# A RECENT HISTORY OF ENGLISH LAW.[1]

IN 1607, if his own word can be believed, "tough old Sir Edward Coke," that monster of legal learning, told King James I. "that causes which concern the life, or inheritance, or goods, or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of the law, which requires long study and experience before a man can attain to the cognizance of it."[2] The celebrated Sir John Fortesque, when pressed on one occasion in the reign of Henry VI. by the legal absurdity of a distinction he was laying down as to when a writ of *scire facias* would and when it would not issue against a person who had possession of the goods of one attainted, finally declared: "Sir, the law is as I say it is, and so it has been laid down ever since the law began, and we have several set forms which are held as law, and so held and used for good reason, though we cannot remember that reason."[3] Then in the case of pleading, for example, we are told that: "rules based upon primitive legal ideas, and upon the physical necessities of an older age, became the permanent basis of an elaborate structure of technical rules. The rules of law on this subject had become fixed before they had had time to become rational."[4] Truly the law does often seem to be based upon artificial reason, and many rules that seem at present obscure and difficult to understand are only explicable by a knowledge of the circumstances under which they arose and by a patient study of their strange and tortuous development.

[1] W. S. Holdsworth, A History of English Law. Boston: Little, Brown, and Company, volume I., 1908, pp. xliv, 460, volume II., 1909, pp. xxxi, 572; and volume III., 1909, pp. xxxviii, 532.

[2] Rep. III. 65, cited by S. R. Gardiner, Hist. of Eng. II. 39, cf., however, R. G. Usher, Eng. Hist. Rev. Oct. 1903, who denies this story. Whether Coke actually made this statement to the King or not it excellently reflects his view of the subject.

[3] Year Books. 36 H. VI. pt. 21 (pp. 25, 26,) cited by Holdsworth, Eng. Law III. 472.

[4] Holdsworth III. 469.

No one of our existing institutions is more securely rooted in the past, none shows a more unbroken continuity of growth than our law. The constant dependence of the judge of today upon ancient precedent is too well recognized to require comment. Burke said over a century ago: "the English jurisprudence hath not any other sure foundation, nor consequently the lives and property of the subject any sure hold, but in the maxims, rules and principles, and judicial traditionary line of decisions contained in the notes taken, and from time to time published (mostly under the sanction of the judges) called Reports. * * * To give judgment privately is to put an end to the Reports; and to put an end to the Reports is to put an end to the law of England."[5] These words would apply almost equally well to the law of present day England, and, to a somewhat less degree, to that of our own land.

Yet it has been and may properly be questioned whether this reference to cases in the past has not all too often been blind and unreasonable. If English law has a history of unbroken continuity it also forms an organic part of the general historical conditions in which it has grown.[6] It is part of a "seamless web" which cannot be torn. While it is not only necessary but desirable for the interpreters and the makers of the law to turn to old decisions and enactments for light and guidance, their vision must be broad enough to include not only the particular decision or enactment but all the circumstances under which it took form, the legal and historical environment in which it was produced must be fully and accurately known. On the one hand, the court, its procedure, and jurisdiction must be present to the searcher for precedent if the cases sought are

[5] Cited by Holdsworth. I. Introd. pp. xliii, xliv. Holdsworth himself states the point excellently: "Even at the present day," he says, "the English lawyer must go to the cases, it may be to very old cases, before he can pronounce a certain opinion. * * * Among the many archaic traits which English law preserves this dependence upon reported cases is perhaps the most archaic. But so inveterate is the habit of dependence upon the cases that lawyers hardly think of it as archaic." Introd. I., xliv. "Some of these courts have ceased to exist; but their decisions remain to be applied by the courts which have succeeded them." Ibid. xliii.

A reliance on cases is as old as the 13th century, and even the early Year Books show that "a considered decision was regarded as laying down a general rule for the future." "The judgment to be given you," said Herle in argument in 1304, "will be hereafter an authority in every quare non admisit in England. Holdsworth, II. 457 citing Y. B. 32, 33, Ed. I. (R. S.) 32.

[6] In the first half of this period [i. e. the period of English history from the Norman conquest to the close of the middle ages] the history of the law is in close touch with the general history of England. We cannot tell the tale of how there came to be a common law without constant reference to these events of political and constitutional history which made a common law possible * * * nor does our debt to that history stop here * * * and that history has * * * shed much light upon our path long after the reign of Edward I." Holdsworth III. 493.

to be interpreted aright;[7] on the other hand, all the problems and motives of the actors must be correctly gauged. The failure to act on these principles has led to the fostering much ancient error, to the retention of a great deal of rubbish, and to the nursing of no end of hoary pedantry. The framers of the Petition of Right incorporated an historical mistake into that fundamental document which has only been corrected within the memory of men now living,[8] the myths which have gathered round Magna Carta are many and various,[9] and it is only recently that Mr. Jenks has told us the true history of the origin and growth of the writ of habeas corpus.[10] A striking example of the persistence of a traditional error was disclosed by the late James Barr Ames. It relates to the famous Statute of 27 H. VIII., c. 10, designed to put a stop to the existing practice of uses. It has been generally stated that the judges defeated its purpose by declaring "without any apparent reason" that "an use cannot be engendered of an use," and that this famous enactment "made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add at most three words to a conveyance." Dean Ames has shown, contrary to the received view, that the doctrine of *Tyrrel's* case (made in 1557 and which determined later rulings) "was older than the statute of uses," had some justification in reason and practice, and that "the statute so far accomplished its purpose, that for a century there was no such thing as the separate existence in any form of the equitable use in land."[11] Such instances might be multiplied; but the present writer has already expressed at sufficient length his views on the advantages to be derived from a study of English legal history.[12] It might not be needless reiteration, however, to emphasize one point of decidedly utilitarian value. If the attendant circumstances of many decisions now accepted as precedents were once thoroughly understood they might be the more easily discarded and thus the way might be prepared for a new attitude toward old questions and for many desired reforms in substance and procedure.

Looking at the question from another standpoint, the legal student of past times might not only do much for the advancement of his own subject, but he might contribute greatly to the cause of

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[7] Holdsworth Introd. I. xliv.

[8] S. R. Gardiner. Const. Docs. 1899, p. 66.

[9] See e. g. W. S. McKechnie, Magna Carta, 1905, especially Pt. III.

[10] In 18 Law Quarterly Rev. 64 (January 1902).

[11] James Barr Ames. "Tyrrel's Case and Modern Trusts." 4 Green Bag 81 reprinted in 2 Select Essays in Anglo-American Legal History, 747 ff.

[12] "English History and the Study of English Law," (May, 1904.) 2 Mich. Law Rev. pp. 649-669.

general historical learning. There is undoubtedly a vast amount of material in the Year Books and in reported cases which would throw floods of light on the industrial, the social, the intellectual, and the religious conditions during the centuries which have gone. Such material unquestionably would tell far more truly what actually existed than would the provisions of statutes. They merely tell us what the legislators intended the law to be and seldom give us trustworthy information as to how far the law was actually enforced.[13] The ordinary historian lacks the technical training to work in this field to the best advantage,[14] and the student of law would find a rich and largely unworked mine which would yield generous results to his delving.

The author of the work which furnishes the occasion for the present article urges earnestly that the history of law should form a regular part of the legal course in the schools.[15] He points out how vital is the connection between the present and the past. In the first half of the period from the Norman Conquest to the Middle Ages "the conditions precedent for the growth of the common law were created, and the foundations of that law were laid upon a basis of primitive customs which were selected, co-ordinated and restated by men who had learned in or from the Italian schools of law. In the second half of it many of its permanent features and permanent principles were settled."[16] In the opinion of Mr. Holdsworth, the fourteenth

[13] A communication made to the Atheneum, May, 1904, and repeated in the Nation shows that the earlier reports can not always be trusted to tell us what actually happened at a trial; for they were generally submitted to the judges for revision before they were published. Hallam was aware of this practice.

[14] Mr. A. L. Smith of Balliol College, Oxford, whose vast knowledge of English constitutional history has furnished inspiration and guidance to a long succession of students, recently told the writer that his early legal studies had been of incalculable value to him in his subsequent historical work.

[15] "It is a subject," he says, "which ought to be taught thoroughly in any university which possesses a law school, for it is essential to a knowledge of the principles of the law; and it is a knowledge of principles alone which a university can teach." Holdsworth II. preface, p. vii.

[16] III. p. 493. In this formative period the reign of Edward I. is especially notable. The eminent justice Hale said that more was done "to settle and establish the distributive justice of the kingdom in the reign of Edward I. than in subsequent ages." History of the Common Law of England, Ed. 4, 1779, p. 152. Maitland in commenting on this passage says: "The main characteristic of Edward's statutes is that they interfere at countless points with the ordinary course of law between subject and subject. They do more than this—many clauses of the greatest importance deal with what we should call the public law—but the characteristic which makes them unique is that they enter the domain of private law and make vast changes in it. For ages after Edward's day king and parliament left private law and civil procedure, criminal law and criminal procedure pretty much to themselves. Piles of statutes are heaped up — parliament attempts to regulate all trades and all professions, to settle what dresses men may wear, what food they may eat — ordain that they must be buried in wool — but we may turn page after page of the statute books of any century from the fourteenth to the eighteenth, both

and fifteenth centuries, upon which so little has been done, "is the period in the history of the common law which is in some ways the most important of all, because many of its external features and many of its doctrines were then taking their permanent shape."[17] He continues: "Great additions were made to the fabric of English law by the new world—new not only in a geographical but also in a social and in an intellectual sense—which opened in the following period. That the common law was able to hold the supremacy which it had won, and in varying degrees to press the mark of its principles upon the new matter thus introduced, was due to this large arsenal of sound principles practically applied, collected by the mediaeval common lawyers. They had welded into one unique whole not only those general rules which the great lawyers of the twelfth and thirteenth centuries, inspired by the example of the Roman law, had laid down as the practice of the king's courts, but also the substructure of local custom and the statutes—especially the statutes of Edward I.'s reign—which guided the development of the principles of the law, or brought it into conformity with the new wants of another age. Though the litigiousness of a partially civilized age, the technicality in procedure which is necessary to an early stage in the history of law, and the collapse of all good government which marked the close of this period, often led them to lay down as law rules which assisted to pervert justice, yet the live practical atmosphere of the law courts in which these rules were evolved by the process of keen debate never let them lose sight of the human needs which these rules were intended to regulate. Thus, amid much ingenuity which was misdirected, there was much which was well directed; and for better or for worse some of its products still color our minds and govern our lives in this twentieth century."[18] Bagehot once stated very aptly that the English judicial system at the beginning of the last century was the result of "bit by bit growth," a "heterogeneous growth of complex past expedients."[19] After hosts of reforms that system retains much of its ancient char-

inclusive, without finding any change of note made in the law of property, or the law of contract, or the law about thefts and murders, or the law as to how property may be recovered or contracts may be enforced, or the law as to how persons accused of theft and murder may be punished. Consequently in Hale's day and in Blackstone's day a lawyer whose business lay with the common affairs of daily life had to keep the statutes of Edward I. constantly in his mind. * * * To a certain extent this is true even now, even after the vigorous legislation of the last sixty years." "Two of Edward's statutes," he continues, "De donis conditionalibus and Quia Emptores terrarum" still are pillars of our land law, to pull them away without providing some substitute would be to bring the whole fabric to confusion." Const. Hist. of Eng. 19, 20.

[17] Holdsworth III. 494.

[18] Holdsworth, III. 495.

[19] Biographical Studies, 284, cited by Holdsworth I. 402.

acter and it cannot be adequately understood except by a thorough study of the elements of which it is composed.[20]

Granted then that English law, of which so much survives, and upon which our own system is based, is an organic growth, and granted that the law student of today, in so far as he has any intellectual curiosity, in so far as he wants to help to hold fast that which is good and to exclude that which is a clog on future development, must not only know the law as it is but the law as it was and came to be, in what way can that knowledge best be attained? It is naturally assumed that the investigator will devote himself to the early codes, to the Year Books, to the reports, and carry on the good work which has been done in this direction in the past. But some preliminary training and knowledge is necessary for this work and some provision is necessary for the man who, while aiming to secure a scholarly acquaintance with the subject, does not aspire to become a specialist.

An ideal way would be to study, in the light of the history of the times, those great masters of legal lore who have left epoch-making and enduring treatises on the law as it existed in their day. For the purposes of such study annotated editions provided with historical introductions might be prepared which could be used in connection with collateral reading and selected cases. Provided that a course of this sort had to be included in a single year a series of extracts would have to be substituted for the whole body in its entirety.

Hitherto Blackstone's famous *Commentaries* have been almost the sole authority used in this way by law schools and law students. His work is still regarded by many competent authorities as "the best general history of English law," and his attitude toward the subject is a scholarly one. "In my apprehension," he wrote, "the learning out of use is as necessary to a beginner as that of every day's practice."[21] Yet for many reasons Blackstone's work by itself is inadequate. In the first place immense contributions to our knowledge of English institutions have been made since his day; furthermore, even with the material which existed in the eighteenth century when he wrote he shows decided limitations: he was a blind

[20] In the field of criminal law, owing to the fact that they feared impeachment, the judges were in the Middle Ages very chary of enlarging the boundaries by judicial decision, and left such changes to the legislature. "Thus it happened that the criminal law has, more than any other branch of the law, been developed by statute." Yet it should be noted that even "these statutes have been interpreted in the light of doctrines which were elaborated in the Middle Ages; and though the statutes have enlarged the boundaries of the criminal law "they were very slow and reluctant to do away with obsolete practices which continued almost up to the present to encumber its growth."

[21] Dict. Nat. Biog. V. 133.

admirer of the existing British constitution, his knowledge of civil law was especially superficial, he lacked originality and virility of thought, and was too prone to use the statements of fact and opinion, often erroneous, of previous writers. It is now commonly admitted that he owed his immense popularity as much to his literary skill as to his legal learning. He succeeded in making the law readable even to the layman. His facility caused Jefferson to protest that "a student finds there [in the *Commentaries*] a smattering of everything, and his indolence easily persuades him that if he understands that book he is master of the whole body of the law."[22] Of the legal authorities whose treatises might be used to supplement Blackstone five stand out preeminent: Glanville, Bracton, Fortescue, Littleton, and Coke.

The pioneer work in the field of English law is the *Tractatus de legibus et consuetudinibus regni Angliae;* formerly ascribed to Henry II.'s justiciar Ranulf de Glanville, it was probably written by his more famous nephew Hubert Walter. This "oldest of the legal classics," compiled near the close of Henry's reign, gives a detailed account of the procedure of the king's courts and throws a flood of light on the laws and legal institutions at a time when that great monarch had completed his legal reforms, had succeeded in curtailing the scope of feudal jurisdiction, had made some progress in defining the wavering and disputed boundary between the ecclesiastical and the law courts, and had settled that there was to be one common law for England at the very moment when the Roman law was threatening to invade the land. The law and procedure which Henry II. did so much to shape, and which the author of the *Tractatus* expounded and perpetuated, forms the basis of the legal heritage of the modern English-speaking world. So this treatise "became a venerated authority among English lawyers; Coke acknowledges that he owed it a heavy debt," and "it long remained the standard text-book of English law."[23] Its fourteen books deal respectively with: the distinction between civil and criminal pleas; the writ of right; vouching to warranty; advowsons; villeinage; the wife's dower; inheritance and final concord; homage; debts and contracts; appointment and authority of attorneys; the writ of right in the lord's court and in the county court; possessory assizes; and pleas of the crown.

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[22] Tucker, Life of Jefferson, II, 361, cited D. N. B. V., 136. Jeremy Bentham, while admitting that Blackstone "first of all institutional writers has taught jurisprudence to speak the language of the scholar and the gentleman," scored him in his Fragment on Government for his excessive laudation of the existing governmental system. Austin attacked both his thought and his style.

[23] Maitland in D. N. B. XXI, 413-415.

In passing from the twelfth to the thirteenth century we come to Bracton who wrote after the year of legal memory, after Magna Carta had been issued, and after successive confirmations had made it a reality. Henry de Bracton, to give him his full name, died in 1268. His *De legibus et consuetudinibus Angliae libri quinque* has been described as "the first comprehensive exposition of English law and by far the most important law-book of mediaeval England." He "was not only writing a commentary upon a young and growing system: he was helping to create that system," and his work, "coming at the end of a period of rapid growth, summed up and handed on its results to future generations of lawyers."[24] Among the great public problems with which he deals are, "the relation of the king to the law," and "the nature and powers of the body which can control the king." The notable thing about the law which he expounds is that it is English case law,[25] though in arranging and systematizing his material he was aided by methods and principles learned from the civilians. While there is considerable dispute as to the extent to which he was influenced by Roman law it seems clear that the substance of his law is based mainly upon English precedents. He compiled his work from transcripts which he made from the plea rolls of the *de banco, coram regis,* and *eyre* courts of Henry III. Fortunately we have his note-book containing abstracts of about two thousand cases. It has been admirably edited by the late Professor Maitland and published in three volumes (by the Selden Society). Bracton's design was to write a complete treatise on the laws of England, but his work at least in the form in which it has come down to us is a torso, ending abruptly in the middle of a discussion of the writ of right. Among the subjects which Bracton treats are: the law of persons; the law of things; the law of actions; the various kinds of jurisdiction within the kingdom; and the pleas of the crown.[26]

Sir John Fortesque (1394-1476) who held the office of lord chief justice of the king's bench during the stormy period of the Wars of the Roses is not, as an expositor of the law, to be compared with the other authorities under consideration and his works deal more with politics than with the law strictly speaking. Yet Coke described *De laudibus legum Angliae* as "worthy of being written in letters of gold." Written for the instruction of Prince Edward, son of Henry VI, it is chiefly devoted to a comparison between the

[24] Holdsworth, II, 187-188.

[25] In him are embodied, says Holdsworth, (II. p. 192) two great typical traits of English law, "dependence upon decided cases, and * * * constant citation of authorities."

[26] Two little treatises appearing sometime after Bracton's death, "Fleta" and "Britton," are mainly restatements in a condensed form of his work.

law of England and that of the continent, especially the civil law of France. As the title would indicate, the comparison is greatly in England's favor. It is interesting to the legal student for the light it throws on trial by jury and other legal institutions. In the pages of this work, for instance, are to be found our earliest account of the Inns of Court, of legal education, and of the ranks of the legal profession. Holdsworth[27] has an excellent passage on the value of Fortescue's treatise. "In his description of the law," he says, "he purposely abstains from technical details. He explains certain elementary doctrines of the common law, and gives an account of some of its most salient features. It is just because it was written to instruct one who was not a lawyer, and never intended to become a lawyer, that it contains information which, being well known to all contemporary lawyers, we get from no other legal writer. It is probably the first legal book which was avowedly written to instruct a layman in the elements of the law. The consequent lucidity of the style, together with the unique character of the information it contains, explain why it has always been among lawyers the most popular of Fortesque's works." There be some who would not agree that clearness of style would be any recommendation to a lawyer; but that is not a question which calls for discussion here. Believing in a strong monarchy controlled by Parliament, Fortescue had a curious double influence on English constitutional history, suggesting measures which led to the Tudor absolute monarchy, and at the same time furnishing weapons to the opponents of despotism.

Sir Thomas Littleton (1402-1481) was a younger contemporary of Fortescue. His treatise on *Tenures*[28] is one of the five great English legal classics. This treatise, giving an account of the various tenures and estates in England with Coke's famous commentary upon it, though now obsolete, was long the chief authority on English real property law. Coke called it "the ornament of the common law, and the most perfect and absolute work that was ever written in any human science. * * * His greatest commendation * * * is," he added, "that by this excellent work which he had studiously learned of others, he faithfully taught all the professors of law in succeeding ages." Littleton, who is the earliest recorded reader of the Inner Temple, subsequently rose to be a justice of the court of common pleas. Among the other distinguishing features of his book is the fact that it was not written in Latin and was altogether

[27] Eng. Law, II, 481.

[28] A recent edition admirably edited by Professor Eugene Wambaugh of Harvard University was published in the Legal Classic Series in 1903.

free from the influence of the Roman law. "Written as it was in the professional law French of the day," says Holdsworth, "it summed up what was then the most practically important branch of the common law. It showed that the common law was not merely a collection of rules of pleading and practice which could be compendiously strung together in the short tracts which for the last century and a half had been the only law books which the profession had produced. It showed that it possessed principles and doctrines of its own which were scientifically exact and yet eminently practical, because they were founded upon the actual problems of daily life. The book was founded upon the Year Books; but it was no mere summary of decisions. The author tries to get beyond the decision to the 'arguments and reasons of the law'[29] and thus to construct from the already vast number of decisions upon various parts of his subject a coherent body of legal doctrine by which 'a man more sooner shall come to the certainty and knowledge of the law.' It is the pioneer in a long series of text books upon various branches of the common law in its completed form. It has been and it is a model both in its methods and in its style to succeeding writers."[30] Curiously enough this book, so valuable for the lawyer, and even more so for the historical student of the law, since it was written at a time when the land law was being profoundly modified, was prepared primarily for the instruction of the author's son Richard—an interesting suggestion of the elder Cato.

It is necessary to pass to the boundary line between the sixteenth and the seventeenth centuries in order to reach the next of our great authorities. Sir Edward Coke (1552-1634) was a prodigy of legal learning, and his *Institutes of the Laws of England*[31] is, with the exception of Blackstone's *Commentaries,* the best known legal treatise in the English language. Starting out as a staunch supporter of the royal prerogative he showed as attorney general a brutal unfairness in browbeating prisoners of state which places him in the category of the infamous Jeffreys.[32] It was only when he came to realize that the crown was encroaching upon the province of the common law that he passed over to the popular side.[33] His influence, for good or for ill, on the development of English law

[29] This point should be noted particularly in connection with what has been said above. Pp. 1-3.

[30] Vol. II, pp. 484-485.

[31] The first of the four parts of the Institutes forms the commentary on Littleton.

[32] For an account of the trial of Raleigh which illustrates this, see Gardiner, Hist. of Eng. I, 123 ff., and the authorities there cited. Cf. State Trials, II, 1-60.

[33] For good accounts of the three stages of Coke's career see Gardiner, Hist. of Eng., Vols. I-VI passim, and D. N. B. XI, 229-244.

and the study of English legal history, has been tremendous. The criticisms which can be marshalled against him and his work are many and grave.[34] His commentaries—and this applies to much of his other writing—have been well described as "a learned collection of disjointed notes,"[35] his reasoning is generally weak, his facts are not infrequently inaccurate, and often his authorities do not bear out the point which they are cited to support. More than this, he was a furious partisan; to apply Disraeli's famous phrase in reference to his novels, it is almost to be feared that when Coke was hard pressed for a precedent he wrote one, or at least he distorted precedents to suit his own views. Certainly he is responsible for many of the traditional errors which like barnacles have clung to Magna Carta for generations, indeed for centuries.[36] Finally, aside from his bias and his inaccuracies he had the fault, common to the legal mind and to the man engaged in current political controversy, of interpreting the past in the light of the conditions of his own time. In consequence, lawyers no longer accept his words as those of an oracle, and they have ceased to have the "intrinsic authority" which Blackstone assigned to them.

Yet Coke's obvious faults must not blind us to the great service he rendered by collecting an enormous mass of material which, properly checked and sifted, has been of incalculable value. Also many of his findings, whether well grounded or not, have become part and parcel of the law. "I am afraid," said Chief Justice BEST, *à propos* of his "Reports," "we shall get rid of a great deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law."[37] Then too he had the merit of putting the crabbed and difficult learning of the Year Books into a style which though pedantic is clear and readable. Consequently, lawyers since his day are more apt to know the Year Books from him rather than at first hand. Fuller said of him in his quaint kindly way: "His learned and laborious works will be admired by judicious posterity while fame has a trumpet left her, and any breath to blow therein."[38]

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[34] Roger North said of his "Commentary" on Littleton, not without some justice, though rather too tartly, that it "ought not to be read by students, to whom it is at least unprofitable; for it is but a commonplace, and much more obscure than the bare text without it." Lives I, 17, cited in D. N. B. XI, 241.

[35] There is a brief but valuable estimate of the value of his "Reports" and "Institutes" in D. N. B. XI, 240-242.

[36] Mr. Edward Jenks, however, in "The Myth of Magna Carta," The Independent Review, Nov. 1904, esp. pp. 272, 273, lays too much blame on Coke's shoulders in this connection, Cf. McKechnie, Magna Carta, index under "Coke," who presents a fairer idea.

[37] 2 Bing. 296, cited D. N. B. XI. 241.

[38] Cited D. N. B. XI. 242.

Later text-book writers have perhaps weeded what is best from his works; but he deserves to be studied in his own pages.[39]

It is not without interest to note that each of the half dozen legal authorities just considered lived and wrote in a period more or less critical in English legal or constitutional history. Glanville's treatise appeared just at the time when Henry II. had just completed his wondrous work of securing a common law for all England, Bracton's after a great body of mediaeval law had been for the first time fully enunciated in Magna Carta and just before Edward I launched his epoch-making and enduring legislation. Fortescue and Littleton's time was that when the old land law was passing away, and the disorders of the Lancastrian and Tudor periods were about to give place to the strong and settled government of the Tudors. Coke lived to see the beginnings of the breakup of the Tudor absolutism in the course of events which led to the Puritan Revolution. Blackstone pictured the English constitution on the eve of these great legal and political reforms which wrought such a transformation in nineteenth century England. The great names of the past century do not properly concern us here; because since the American Revolution Great Britain and the United States, the two offspring of the common parent—ante-revolutionary England—have each gone their separate ways.

Now it would seem that in those of our leading American law schools which are developing courses in historical and scientific jurisprudence, which are planning to grant the doctor's degree in these subjects, a study of these great legal authorities, in orderly sequence, would be a *sine qua non*. At the same time it must be admitted that such a course would be a luxury which few schools could afford at the present time, and which few students could or would take, even were it offered. It would require highly trained teachers, at home in history as well as in the law, and it would require editions equipped with an apparatus such as we do not at present possess. Still it is a desideratum, and the harvest is tempting in proportion as the laborers are few.

Nevertheless, even under present conditions, all schools could and should give a general course in the history of English law. For such work, though it need not supplant lectures and collateral reading, an adequate text-book is desirable. Until recently, however, a satisfactory work of this sort has been lacking. John Reeves car-

[39] Not the least of his merits is that he omits all reference to feudal law as a part of the law of real property. Much regarding feudal origins in this connection it is now thought was the invention of later writers who got their ideas from the continental jurists. Ibid, same page.

ried his *History of the English Law* through the reign of Queen Elizabeth, publishing his fifth and last volume in 1829, thus completing a work begun in 1783. Excellent as his history is, it is now rather antiquated in places. An attempt made in 1869 by Finlason to bring the work up to date was far from successful. Pollock and Maitland's remarkable *History of the English Law,* which cannot be too highly praised for its vast learning, its legal acumen, and the brilliancy and distinction of its style, takes us only to the reign of Edward I. The *Essays in Anglo-American Legal History* selected by a committee of the Association of American Law Schools contains matter of great value, well chosen from acknowledged authorities, and should be very useful for reference in any historical course; but the work is not adapted for a manual. It lacks the necessary well knit continuity and it professedly does not include much on public law or history.

There are many other works which take up special aspects of the law. They are all well known: for example, Holmes's *The Common Law,* Stephen's *History of the Criminal Law,* Pike's *History of Crime,* and Digby's *Introduction to the History of the Law of Real Property.* These works, or portions of them, indispensable for collateral reading, could not, it is needless to say, be used to any further extent in a comprehensive general course.

Realizing the need of a compendious treatise which should embody the results of the latest investigation Mr. W. S. Holdsworth, who has had the advantage of a two-fold equipment for the undertaking by his training as a barrister and his experience as professor and lecturer in law, began a work on the subject the first volume of which he published in 1903. The two concluding volumes appeared in 1909. The first volume is occupied almost exclusively with an historical description of the origin and functions of the courts from the Anglo-Saxon period to the present day. The two succeeding volumes deal with the general history of the law to the beginning of the modern period, and with "the later history of some parts of the common law doctrine which attained in substance their final form in the mediaeval period." From the point where Pollock and Maitland leave off there has been much pioneer work to do, and the author in making his way through this wilderness with few blazed trails to guide him has by no means over-estimated the difficulties of his task.

The second and third volumes of Mr. Holdsworth's history are divided into two books. Book I. on Anglo-Saxon antiquities covers roughly the first hundred pages of the second volume. Part I. of

this book is occupied with sources and general development. The importance of the period is brought out, feudal and ecclesiastical influences are rapidly sketched, and the codes, the land charters, and contemporary literary works briefly described. Part II. is devoted to the rules of law, under which head the ranks of the people, criminal law, the law of property, the law of succession, infancy and guardianship are successively treated.

Book II. comprises the remainder of the second and all of the third volume. The divisions and subdivisions are manifold. Part I.—which deals with what the author is pleased to call the mediaeval period, *i. e.,* from the Norman conquest to the fifteenth century —following the plan of the first book in the Anglo-Saxon period is devoted to sources and general development. The interval from the Norman Conquest is treated as the period of the beginnings of the common law. Under "European influences," we are told much about the revival of the study of the Roman law, and its influence on the development of the English system is judicially estimated. Then follows an account of the English sources of law: the Domesday book, the pipe rolls, royal ordinances, chancery enrolments, plea rolls and all the rest; also of connected treatises such as the *Dialogus de Scaccario* and the treatise attributed to Glanville. In each case the state of the law revealed by these sources is expounded. Following the same plan, the progress of the common law is treated in subsequent periods, in the reign of Henry III., in the reign of Edward I., the time of "the settlement of the sphere of the common law," and in the fourteenth and fifteenth centuries. In these chapters many matters of interest are included: the separation of the legal profession from the clerical and ecclesiastical; the beginnings of statute law; forms of action and procedure; the growth of writs; the development of influences which shaped the common law; the effect of the rise of parliament on legal development; the law administered not only by the common law courts but by the local courts as well; the interplay of cause and effect in the relations between legal, political, and constitutional history. Under the heading of "the legal profession and the law" we are told somewhat about the serjeants, and other members of the profession, and their legal education. The account of the inns of court, in this connection, though containing much that is valuable and interesting, is not altogether clear or satisfactory on many points.

Part II. of the second book, devoted to the "rules of law" occupies the whole of the third volume. It is subdivided into six chapters of varying length. Chapter one on the land law treats of real

actions, tenures free and unfree and chattels real, the incidents of tenure, the power of alienation, seisin, estates, incorporeal things, inheritance, modes and forms of conveyances, and special customs. Among the subjects dealt with in the second chapter are: self help, treason, offenses against the person, principal and accessory, the possession and ownership of chattels, wrongs to property, principles of liability and lines of future development. The third chapter is devoted to contract, discussing the whole subject historically, with particular reference to the period from Glanville to the sixteenth century. Chapter four treats of persons, including the King, the incorporate person, the villein, the infant, and the married woman. The fifth chapter on succession to chattels considers the will, restriction on testation and intestate succession, and the representation of the deceased; under this latter head the origin and functions of the executor and the administrator are discussed in a full and interesting fashion. The sixth and last chapter gives a rather too brief account of procedure and pleading.

Space will not permit of pointing out the many places in the various volumes where a problem is neatly expressed[40] or a particular topic treated exceptionally well. A few that might be just indicated are: the pages on habeas corpus and Magna Carta, on the two courts of exchequer chamber, the careful weighing of the merits and defects of the jury system, the account of chancery and its manifold abuses, the discussion of the general causes of feudalism, the indictment of the legal effects of the increase of parliamentary power in the fifteenth century, the excellent summary of the excellences and imperfections of the law in the fourteenth and fifteenth centuries, and the picturesque account of mediaeval wills. In connection with wills the author brings out strongly the hardships to which early executors were subjected and the chances which dishonest creditors had before chancery stepped in. The stories illus-

[40] The following is a sample of his power of effective expression: "We must not, however suppose that the royal court attempted to attain abstract justice at the expense of their rules of procedure and pleading. No workable legal system can be formed unless there is a strict adherence to rules and forms, even at the cost of justice in individual cases. * * * One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for substantial justice with a system of procedure rigid enough to be workable. It is easy to favor one quality at the expense of the other, with the result either that all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves." II, 195-7. I have already quoted too freely from Mr. Holdsworth during the course of this article to make it necessary to select further extracts to illustrate his style.

trating the manners and wit of the bench and bar are mostly very flat; but they serve to bring out the human character of the time. Nevertheless, many well selected extracts from contemporaries, scattered here and there through the book, testify that the author himself is not without a sense of the quaint, the humorous,[39] and the picturesque. Among such citations is one which describes the court of chancery at one stage in its career as "a mere monopoly to cozen the subjects of their monies."[41] On the subject of chancery he quotes that lovely list from Campbell on the delays of Eldon: "he expressed doubts—reserved to himself the opportunity for further consideration—took home the papers—never read them—promised judgment again and again—and for years never gave it—all the facts and law connected with it having escaped his memory."[42] A curious case of noxal liability may not be known to some. It is extracted from Leg. Henr. 90.7. *"Si homo cadat ab arbore vel quolibet mechanico super aliquem, ut inde moriatur vel debilitetur; si certificare valeat, quod amplius non potuit, antiquis institucionibus habeatur innoxius; vel si quis obstinata mente, contra omnium estimacionem, vindicare vel weram exigere presumpserit, si placet, ascendat, et illum similiter obruat."*[43] Of two other bits one shows a piety, and the other a misogyny, that certainly take one back to the middle ages. "The judges according to Fortescue usually sat from 8 a. m. to 11 a. m. The rest of the day they spent in the study of the law, in reading of Holy Scripture and using other kind of contemplation at their pleasure."[44] Of course a monk is responsible for the other: *"Sunt tria gaudia, pax, sapientia, copia rerum; haec tria dirruit, haec tria destruit ars mulierum."*[45]

One quotation is long and may be known to many; but it illustrates so strikingly the anomaly in the old law of divorce that it is impossible to resist the temptation to repeat it here. It is from an address by Maule, J., to a prisoner convicted of bigamy, after his wife had committed adultery and deserted him. "Prisoner at the bar," he said, "you have been convicted of the offense of bigamy, that is to say, of marrying a woman while you have a wife still alive, though it is true she has deserted you, and is still living in adultery with another man. You have, therefore committed a crime against the laws of your country,

[41] I. 222.
[42] I, 226-227.
[43] II, 37.
[44] II, 414.
[45] II, 273. Note 9. Cited from the Ramsey Cart. III, 316.

and you have also acted under a very serious misapprehension of the course which you ought to have pursued. You should have gone to the Ecclesiastical Court and there obtained a decree against your wife *a mensa et thoro*. You should then have brought an action in the Courts of Common Law and recovered, as no doubt you would have recovered, damages against your wife's paramour. Armed with these decrees you should have approached the legislature, and obtained an act of Parliament, which would have rendered you free, and legally competent to marry the person whom you have taken on yourself to marry with no such sanction. It is quite true that these proceedings would have cost you many hundreds of pounds, whereas you probably have not as many pence. But the law knows no distinction between rich and poor. The sentence of the court upon you therefore is that you be imprisoned for one day, which period has already been exceeded, as you have been in custody since the commencement of the assizes."[46]

As might be expected in a work of this character, there are long stretches which make close reading and where the meaning is often elusive enough, certainly for the layman. In these patches of gloom many of the extracts from ancient and modern authorities are welcome enough for illuminating the exposition and stimulating the interest. Yet the author is too prone to take refuge in a not all too clear quotation to explain an obscure point. This criticism does not apply to the use he has made of the scholar who has helped him most in the period before Edward I.; for Maitland had the rare art of presenting his wide learning and his shrewd and luminous reflections in apt and telling phrases, often rippling with humor. It is pleasant to add that no one could acknowledge an indebtedness to the great master of English mediaeval law more generously than Mr. Holdsworth has done.[47]

The general method of presentation employed in this newest of the histories of English law might be criticised on the ground that it involves too much repetition. The author himself admits it. "Perhaps a word of explanation," he says, "should be given of the plan upon which these two [last] volumes have been written. In all histories of this kind the difficulty is to adjust the claims of a chronological narrative with the necessity of giving a connected account of the various parts of legal doctrine. To adopt the chronological order alone involves a fragmentary account of the history of

[46] Holdsworth, I, 390-391.

[47] For his warm and eloquent tribute see Vol. II, preface p. vi.

legal doctrine; and, on the other hand, to simply trace the history of several branches of legal doctrine involves an inadequate account of the general legal development. The author has endeavored to meet this difficulty by adopting the chronological order in the parts which are devoted to the general history of the law, and neglecting it in the parts which are devoted more especially to the history of legal doctrine. No doubt this method involves some repetition; but the risk of incurring the reproach of repetition is preferable to the risk of incurring the reproach of obscure or inadequate treatment."[48] Possibly the difficulty is unavoidable, and Mr. Holdsworth's method has the high authority of the arrangement adopted by Pollock and Maitland in their monumental *History of English Law*. On the other hand, Maitland in his suggestive lectures on the constitutional history of England, published in 1908, chose to divide his subject into periods, including everything which had happened during the interval within the successive divisions. To be sure, he confined himself to public law and constitutional history; but it would seem that the plans might be extended to include private law. To the present writer, at least, the book under consideration would have been all the better for distributing portions of the matter treated in the third volume under the historical subdivisions in the second. However, if there is any virtue in this suggestion, it might be adopted in the assignment of readings by the teacher who may chance to use the work as a manual or for a book of reference.

Perhaps the chief merit which Mr. Holdsworth would claim for his history is that of bringing together in one place the results of legal study embodied in many treatises and monographs old and new.[49] Nevertheless, he has not contented himself with culling from secondary works alone but has gone valiantly to the sources for verification and amplification. Innumerable references to Year Books, reports, statutes, calendars, and all sorts of other authorities testify to this. And while he has not discovered many new truths, nor would one expect it in a general work, he has rested his state-

[48] II, preface, p. vi.

[49] One serious limitation in the use of authorities notable especially in the first volume is the author's failure to employ the results of German scholarship. It is not till the second volume that he makes any mention of Liebermann whose editions of the Anglo-Saxon laws, and of other works on that and the Anglo-Norman period, are epoch-making and no doubt definitive. Again he apparently makes no reference whatever to Brunner to whom English writers owe so much, and to whom Maitland and J. B. Thayer have acknowledged such indebtedness. Finally Mr. G. B. Adams might have taught him somewhat as to the nature of Anglo-Saxon feudalism. Am. Hist. Rev. VII, 11-35.

ments on a surer foundation for the pains he has taken[50] and has not followed blindly the paths which others have traced.

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[50] It would be beside the purpose here to discuss exhaustively Holdsworth's statements of fact; but a few which are open to question might be merely indicated. The explanation of the palatine rights of Durham would not be generally accepted (I, p. 12); the statement about the division of the curia regis is very blind, apparently the earliest division was one of functions rather than of personnel (22); the old error is repeated that the Exchequer got its name from the fact that the table around which the members sat was covered with a chequered cloth (28); there was one exception at least to the practice that sheriffdoms were not hereditary (39); Lambard's celebrated Eirenarcha or "of the Offices of Justices of the Peace" was written in 1581 and not in the reign of James I. (125); it shows a lack of discrimination to use the partisan and hostile Roger North as the sole authority for Shaftesbury's qualifications as Lord Chancellor (207); the South Sea Bubble did not break in 1725, but five years earlier (229); it cannot be true that the dismissal of Franklin had such an important part in the causes of the American Revolution as is here stated (299, 385); it is rather mild to say that the act of six articles in 1539 "made the holding of certain opinions felony"; Parliament did not abolish the Ecclesiastical courts in 1640 (380); the West Saxons did not become supreme under Egbert in 800; he did not begin to rule till 802 and his supremacy was not generally acknowledged till toward the close of his reign (II, 4); in discussing the question of folk-land and book-land the author does not attempt to explain about the royal lands (57-58); another reason is commonly given for the abolition of danegeld, namely that the pious Edward the Confessor thought he saw the devil sitting upon the money bags (119); on p. 147 it is stated that the court of 1178 comprised six members, in Vol. I, p. 34, the number is correctly given as five; one would like to know on what ground Segrave could be called "a great justiciar" (179); in the discussion of intestate succession it is not clearly stated what the present law is (III, 435-443).